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No. 247

In the Supreme Court of the United States

October Term, 1962

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA AND THE INTERSTATE
COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA

MOTION TO AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 247

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

MOTION TO AFFIRM

Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a judgment of a three-judge district court (J.S.A. 14)[1] which dismissed

[1] "J.S." and "J.S.A." refer to the Jurisdictional Statement and the separate Appendix to the Jurisdictional Statement, respectively.

appellants' complaint seeking to set aside an order of the Interstate Commerce Commission. Atlantic Coast Line Railroad Company ("Coast Line") and Georgia Rail Road & Banking Company ("Georgia Railroad"), appellants, sought to enjoin an order of the Commission which sustained tariffs of the Southern Railway Company ("Southern") and its subsidiary, Georgia Southern and Florida Railway Company ("Georgia Southern"), cancelling certain through routes for coal.

Prior to January 6, 1956, coal originating on rail lines in Kentucky and Tennessee moved on commodity rates to Atlanta, where any one of four carriers, Southern, Central of Georgia Railway Company ("Central"), Coast Line, or Georgia Railroad transported the coal to connections of the Georgia Southern at Macon or Cordele, Georgia. Georgia Southern then delivered the coal shipments to destinations on its line, including the Warner Robins Air Force Base, the primary shipper here involved. Each appellant's participation in this traffic amounted to only approximately 150 carloads per year (J.S.A. 37). Between Atlanta, Georgia, and Warner Robins, the respective distances via the through routes here in issue are as follows (J.S.A. 16, 36):

(1) Via Southern ..... 104 miles
(2) Via appellant Georgia Railroad ..... 219 miles
(3) Via Central ..... 119 miles
(4) Via appellant Coast Line ..... 220 miles[2]

[2] This includes a back haul of 48 miles (J.S.A. 2).

Thus, appellants' through routes were approximately 100 percent more circuitous than the routes via Southern or Central.

By tariffs filed to become effective January 6, 1956, Southern and its subsidiary, Georgia Southern, proposed to eliminate the participation of the Central, Coast Line, and Georgia Railroad through routes on the foregoing movements of coal. The Commission suspended these schedules and entered upon an investigation. In *Routing, Coal. L. & N. R. and N., C. & St. L. Ry. to G.S. & F. Ry.*, 300 I.C.C. 125 (1957), the Commission found that the proposed cancellation of routing was not shown to be just and reasonable and ordered the schedules cancelled (J.S.A. 23). This order was set aside and the case remanded by a three-judge district court in *Southern Railway Company* v. *United States*, 167 F. Supp. 747 (J.S.A. 1). In setting aside the Commission's decision, the court found that the Commission's refusal to permit cancellation of Southern's through routes with Coast Line and Georgia Railroad, the two longest routes, was not supported by the record but that the route of Central was so little longer than Southern's that the court could not overrule the Commission's finding (J.S.A. 11–13). In remanding, the court said (J.S.A. 12–13):

> It is not within our province to give effect to a part of the suspended schedule and to cancel other parts of it. It is possible for the Commission so to shape its report and order as to permit the schedule to stand so far as they eliminate routes Nos. (2) and (4) but not No. (3). We do not even conclude that

> the Commission must do this. We do conclude that on the present record and findings the Commission could not legally conclude that the plaintiff had not carried its burden of showing that the elimination of routes (2) and (4) is consistent with the public interest.

On remand, appellants (but not Central) petitioned the Commission to reopen the record for the receipt of additional evidence (J.S.A. 10–11). By order of March 23, 1959, the Commission reopened the proceeding and vacated its earlier requirement, which had been set aside by the district court, that Southern eliminate its tariff restrictions regarding appellants Coast Line and Georgia Railroad. Insofar as the earlier order affected Central's through route, the order was continued in effect and Southern was not permitted to cancel the route (J.S.A. 45–47). Thereafter, Southern filed tariff schedules again including no through routes with the Coast Line and Georgia Railroad, but maintaining Central's route. After the schedules were filed, appellants requested suspension and investigation in *Routing Coal, L. & N. Mines to G.S. & F. (SRS) Stations,* Docket No. 33128. This proceeding was heard and determined with the reopened proceeding (J.S.A. 34).

On May 19, 1961, the Commission entered a report and order determining that the cancellation of the Coast Line and the Georgia Railroad through routes was consistent with the public interest and just and reasonable, and discontinuing the proceeding. *Routing, Coal, L. & N.R. and N., C. & St. L. Ry. to G.S. & F. Ry.*, 313 I.C.C. 752 (1961) (J.S.A. 34). Appellants' petition for reconsideration was denied

(J.S.A. 49). The district court sustained the Commission, ruling that its decision was in accordance with law and based upon appropriate findings supported by substantial evidence.

ARGUMENT

Appellants' principal contentions are that the Commission's order is not supported by adequate findings and substantial evidence, that the elimination of the through routes with the Georgia Railroad amounts to a discrimination between connecting carriers in violation of Section 3(4) of the Interstate Commerce Act (49 U.S.C. 3(4)), and that the Commission was required to determine under Section 1(4) and 1(5) of the Act (49 U.S.C. 1(4), 1(5)) the reasonableness of the resulting combination of local rates over the through routes to be cancelled. However, the established facts that appellants' routes are wastefully circuitous, meet no shipper need, and are not profitable on this traffic fully support the Commission's decision and leave no substantial question warranting plenary consideration by this Court.

1. We submit that the district court was clearly correct in holding (J.S.A. 18–19) that appropriate and sufficient findings, based on substantial evidence, support the Commission's conclusion that cancellation of the through routes is consistent with the public interest. As previously noted, appellants' routes are nearly twice the length of the retained routes, resulting in "undue circuity" (J.S.A. 42, 43), and economic waste. Further, there was evidence that this coal traffic is not profitable to appellants (J.S.A. 40–41).

Southern has carried virtually all the coal traffic to destinations other than Warner Robins in recent years (J.S.A. 36–37). The other carriers have shared the traffic to Warner Robins only because of a policy of the Federal Government to distribute traffic among available routes (J.S.A. 37–38). Practically no shipper interest was shown for the continuation of the highly circuitous routes of Coast Line and the Georgia Railroad. No witness from Warner Robins appeared. In the first proceeding, two witnesses representing a coal operators' association and a cement manufacturer appeared, but their testimony was, in the words of the district court in its first decision, "not sufficient to amount to more than the usual wish of shippers to have as many competing lines available to them as possible. The Commission made no finding that the wishes of the two shipper witnesses were warranted by a single fact in the record. It merely stated the shipper's desires" (J.S.A. 11). These two witnesses did not reappear in the second proceeding (J.S.A. 39). The only shipper at the second hearing (a paper manufacturer) expressed "fears that the closing of the route might affect service over the Georgia Railroad in the movement of pulpwood to, and paper products from, the plant at Mead [Georgia]" (J.S.A. 39). But Georgia Railroad had reduced service a full year and a half prior to the closing of the coal route, and the lost coal traffic following the closing of the route amounted to barely three cars a week for this railroad (J.S.A. 40).

2. Appellants contend (J.S. 25–29) that cancellation of the Georgia Railroad route results in a dis-

crimination in violation of Section 3(4) of the Act by Georgia Southern at Macon, Georgia, a common point reached by Southern, Central, and Georgia Railroad, in favor of Southern and Central, and against the Georgia Railroad. The claimed discrimination, however, results entirely because the Georgia Railroad, unlike Southern and Central, is not given a through route. If, as we have shown, the Georgia Railroad was not entitled to a through route, there was no discrimination against it.

A violation of Section 3(4) can occur only if the circumstances and conditions among the lines which reach a common point (here Macon) are substantially similar. The same findings supporting the decision that cancellation of the Georgia Railroad's through route is in the public interest also support the distinction between the through route of the Georgia Railroad and that of the Southern or the Central. As the Commission found, the undue circuity of the Georgia Railroad's route negates any possibility of similar circumstances and conditions as between the Georgia Railroad and the retained routes (J.S.A. 42–43). See also *Routing, Birmingham—Montgomery, Ala., L. & N.R. Co.*, 291 I.C.C. 489, 494 (1954); *Atlantic Coast Line R. Co. v. Southern Ry. Co.*, 304 I.C.C. 655, 665 (1958). To adopt appellants' theory of Section 3(4) would be, in the words of the district court, "to eliminate consideration of the route itself and the factors relating thereto such as circuity and waste from consideration in a route closing case" (J.S.A. 21).

Appellants' reliance upon cases involving switching services is misplaced. This case raises no issue of

the proper charge for the service performed by Southern's subsidiary between Macon and Warner Robins. Rather, the sole issue is whether cancellation of through routes from origins in Kentucky and Tennessee is in the public interest, and this is a matter entirely distinct from the provision of switching services. See *Louisville & Nashville R.R.* v. *United States*, 238 U.S. 1.

3. Appellants contend (J.S. 17–22) that Section 1(4) and 1(5) of the Act require that all rates be "just and reasonable" and that the Commission was required to determine the justness and reasonableness of the resulting higher combination rates once the appellants' through routes had been closed. The determination whether through routes should be permitted, however, does not depend on the level of either the joint rates or the combination rates which would replace them. The reasonability of through routes depends on such factors as shipper requirements, the circuity of the routes, and the need for competition and interchange between carriers (see J.S.A. 7, 10).

"[T]he test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service." *Thompson* v. *United States*, 343 U.S. 549, 557. Here Southern and its subsidiary stated their intention no longer to hold themselves out as participants with appellants in through routes on the coal traffic involved by publishing tariffs cancelling the through routes and joint rates. We have seen that this decision was properly upheld by the Commission and the district court. The existence of a through rate necessarily presup-

poses the existence of a through route. *Southern Railway Company* v. *United States*, 153 F. Supp. 57, 61 (W.D. N.C.), affirmed 355 U.S. 283. Consequently, the cancellation of the through route leaves no basis for continuance of through rates, and the Commission is not required to make unnecessary findings concerning the reasonableness of through rates over nonexistent through routes. In short, the lawfulness of the rates was in issue only from the outset of the proceeding until, as the district court aptly stated, "The routes were closed and no question was left as to rates" (J.S.A. 20).

4. Appellants also argue (J.S. 22, 24) that the Commission erred in continuing in effect a portion of its order of March 19, 1957, following the decision of the district court setting aside such order (J.S. 22). As noted in the Statement above (p. 3), the district court had sustained the Commission's finding that Southern should not be allowed to cancel Central's through route. At the same time the court set aside the entire decision since Southern had carried its burden of showing that elimination of appellants' routes was consistent with the public interest (J.S.A. 12–13). Although the district court was without jurisdiction to give effect to a part of a suspended schedule, the Commission was not so bound. Consequently, upon remand, the Commission required Southern to maintain Central's through route in effect in accordance with its prior findings respecting Central's route, which had been upheld. At the same time, the Commission reopened the proceeding concerning appellants' routes which gave appellants full opportunity to be heard.

In addition, even assuming that the Commission erred in requiring Southern to maintain Central's route, and that the Commission should have vacated the entire order that had been set aside, appellants are without standing to raise this issue since they were not injured. If all the through routes had been cancelled except Southern's, all the traffic would have gone to Southern; as it was, Central participated in some of the traffic following the closing of appellants' routes. However, appellants have no legal interest in whether Southern gets all the traffic or shares some with Central.[2]

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court below should be affirmed.

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AUGUST 1962.

[2] Moreover, appellants failed to raise this question before the Commission and thus have waived the point. *United States* v. *L. A. Tucker Truck Lines*, 344 U.S. 33, 36–38; *Unemployment Commission* v. *Aragon*, 329 U.S. 143, 155.

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Appellants

UNITED STATES OF AMERICA, *et al*
Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE
DISTRICT OF GEORGIA

BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

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September 1962

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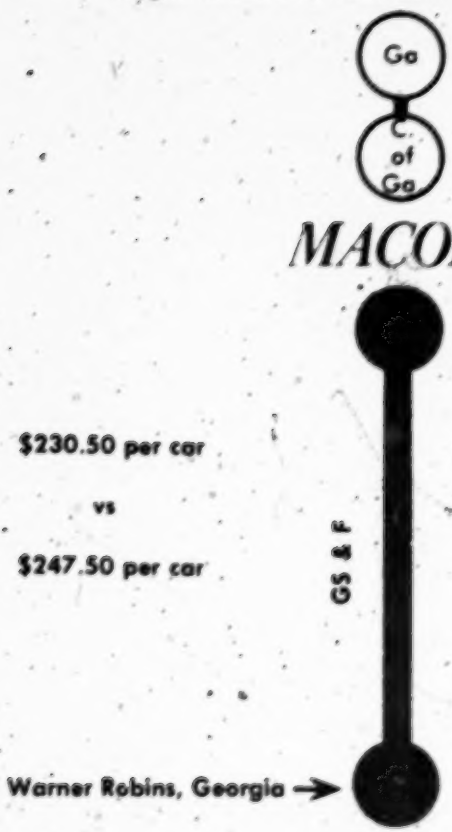
DISCRIMINATION

Chart showing the most glaring example of discrimination (at Macon) on shipments of coal from Windrock, Tenn., a representative origin, to Warner Robins, Ga., a representative destination, but bearing in mind the fact that:

ALL TRAFFIC INVOLVED IN THIS CASE ORIGINATES ON THE LOUISVILLE & NASHVILLE RAILROAD COMPANY AND IS TRANSPORTED IN EQUIPMENT OWNED BY LOUISVILLE & NASHVILLE RAILROAD COMPANY, AN APPELLANT HEREIN

Origin: Windrock, Tennessee

Commodity: Bituminous Coal



Cars: Whether traffic moves via Central of Ga. or via Georgia Railroad both cars of coal would be tendered to GS&F by Central of Georgia at Macon.

Thus, the

Service performed by GS&F would be identical whether it handles a car that previously moved via the Central of Georgia or the Georgia Railroad, and the

Distance would be identical from the point where discrimination is charged (Macon) to final destination. Yet, the

Rate from Windrock, Tenn. to Warner Robins, Ga. is 461 cents per ton ($230.50 per car) or 495 cents per ton ($247.50 per car) depending solely upon which of these two connecting lines the traffic moved before reaching the point where discrimination is charged.

Source: Exhibits Nos. 47, 51, 60, 61.

SEE APPENDIX A HEREIN FOR DISTANCES, CIRCUITY AND SERVICE VIA ALL ROUTES IN QUESTION FROM REPRESENTATIVE ORIGIN TO REPRESENTATIVE DESTINATIONS.

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BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

FOREWORD

Appellants' jurisdictional statement sets forth the basis of this Court's jurisdiction over this appeal, the statement of the case and a statement of the questions presented. It also contains references to the opinions of the District Court, the reports of the Interstate Commerce Commission and the applicable stat-

utory provisions, all of which were reproduced in a separate volume entitled "Appendix to Jurisdictional Statement."[1]

Motions to affirm the most recent judgment of the District Court have been filed by the defendants below, Southern Railway Company and its subsidiary, Georgia, Southern & Florida Railway Company, hereinafter referred to as Southern, the Interstate Commerce Commission and the United States of America, hereinafter referred to as the Government.

It is appellants' position that the questions raised by this appeal are substantial, of general public importance, and stand virtually unchallenged. In fact, both motions to which this brief is in opposition plunge head-on into the merits of the proceedings before the Commission rather than justify the Court action which they seek to have affirmed. Therefore, they never come to grips with the gravamen of this appeal, i.e., the substantiality of the questions presented.

In view of the foregoing, appellants submit that these questions merit full consideration by this Court and that the judgment of the District Court should be reversed.

SUMMARY OF ARGUMENT

In this proceeding, the Commission suspended, conducted a full hearing and condemned tariff provisions published by Southern seeking to eliminate joint rates

[1]/Reference to the page number of the record in the proceeding before the Commission will be preceded by "Tr.", to Appellants' Jurisdictional Statement by "JS", to the Appendix to Appellants' Jurisdictional Statement as "JS App.", and to the record before the Supreme Court by "R", and all will be parenthetically expressed.

via certain through routes which had been applicable for more than a half century. Thus, the initial schedules or requested changes which were published by Southern in the latter part of 1955 to become effective on January 6, 1956, **never became operative.** In fact, they were finally cancelled on October 5, 1957, in a proceeding designated as Investigation and Suspension Docket No. 6538 and as reflected in the Commission's report and order dated March 19, 1957 (JS App. 23).

The District Court, however, vacated and set aside this initial decision by the Commission in **Southern Railway Co. v. United States,** (1958) 167 F Supp. 747 on the grounds that the order Southern complained of did not contain basic findings sufficient to sustain its validity. The Commission vigorously defended its order as did the United States and while the District Court made certain dicta statements concerning portions of the proposed changes nevertheless stated "it is not within our province to give effect to a part of the suspended schedules and to cancel other parts of it." (JS 10, JS App. 12). Thus, the decree set aside the order **in toto** thereby placing the entire proceeding **in fieri** and any appeal at that stage would have been premature to say the least. As to the basis upon which its decision would rest, the Court specifically stated, "Our disposition of the case is based on the nature of the findings and conclusions of the Commission." (167 F Supp. at p. 752).

The Commission, in an attempt to proceed under the remand decree, issued an order on March 23, 1959, that not only reopened Investigation and Suspension Docket No. 6538 but continued in full force and effect a part of its prior order without any attempt to obtain

the necessary relief from the Federal Court that had set it aside. (J.S. app. 46, 47) Since the schedules referred to in the Commission order of March 23, 1959, were no longer in existence, having been effectively cancelled on October 5, 1957, like schedules or requested changes were then published by Southern to become effective on July 13, 1959. However, the Commission ordered that an investigation be instituted into the lawfulness thereof **on July 10, 1959, before such schedules or requested changes became effective** in a proceeding designated as ICC Docket No. 33128. (reproduced herein as Appendix B). Thus, the basic issues were raised at the time the investigation was instituted and pertained to the causal effect of proposed changes on the **factual situation existing at that time, to-wit July 10, 1959.**

No one disputes the fact that **joint** rates applied via the **through** routes in question at that time but the Commission failed to make a finding with respect to the nature of those routes. Certainly, nothing happened thereafter that could possibly have changed either the issues or the nature of those routes and the Commission's use of the term "closed", in referring to such routes in its decisions, was intended to be synonymous with its use of the term "commercially closed." In other words, after the investigation was instituted and the proposed changes became temporarily effective subject to a final determination of the issues theretofore raised, the routes in question became "commercially closed" because the increased rates brought about by such changes were and still are prohibitive (these are the rates designated by an increase symbol in the tariff as reflected in the Commission's order of investigation—see Appendix B herein).

Apparently in the remand proceedings, the Commission was convinced that only a different conclusion would satisfy the Court; particularly so, since no finding was made as to the nature of those routes. The sole distinction that can be drawn between the report approving the schedules on further hearing and the prior report of the Commission condemning like schedules is that dicta statements made by the Court concerning various aspects of the "public interest" issue were erroneously construed to be **the law of the case** as Southern contended they should be treated.

In any event, the Commission failed or refused to prescribe reasonable and non-discriminatory through rates under 49 U.S.C.A.§§ 1 and 3, improperly limited the issues to 49 U.S.C.A.§ 15(3) and concluded by stating "We find that the schedules under investigation are just and reasonable" (J.S. app. 43). The latter does not, however, constitute a finding that the rates are lawful since rates may lie within the zone of reasonableness and yet be unlawful.

In its second review, **Atlantic Coast Line Railroad Co. v. United States,** (1962) 205 F. Supp. 360, the District Court enumerated the findings which it says the Commission made and held that such findings were warranted in law and in fact when tested by 49 U.S.C.A.§ 15(3) and 49 U.S.C.A.§ 15(7). It further held at page 364 that findings with respect to 49 U.S.C.A. § 1(4) and 49 U.S.C.A. § 1(5) were neither made by the Commission nor necessary since "the routes were closed and no question left as to rates." As to the discrimination provisions of 49 U.S.C.A. § 3(4), the Court said, at page 365, "We are not here concerned with switching or terminal services" and

"the route of the Georgia being closed does not compare with that of Southern or the Central of Georgia." Therefore, appellants' plea to have the Commission's order vacated and set aside was denied.

The errors of the District Court which led it to misapprehend and misapply the proper standards for determining whether the order complained of was supported by adequate findings and substantial evidence fall into three general categories, i.e., fact, law and scope of judicial review.

First, as to the facts, the District Court misconstrued the effect of the schedules involved by finding that the routes were "closed" rather than "commercially closed" and finding that this case does not involve rates. Such findings are diabolically opposed to and in irreconcilable conflict with:

(a) the Commission order of July 10, 1959, instituting the investigation,
(b) the rate tariffs designated in that investigatory order which includes as to each "the reference mark bearing an increase symbol," and
(c) the Court's own description of those tariffs in its initial review as to what they purport to do.

In addition, the Court attributed certain findings to the Commission which the latter did not make. For example, the lower court said that the Commission had found that the routes in question resulted in "an unnecessarily higher cost than was the case over the Southern route", whereas the Commission did not make a finding that such routes resulted in a higher cost — much less an unnecessarily higher cost — as to the rates discriminated against than was the case over

either of the preferred routes to which the joint rates sought by appellants now apply. (Other examples are set forth in JS pp. 29-33).

Second, as to the law, the District Court misapplied the "holding out" test which was adopted by this Court in **Thompson** v. **United States** (1952), 343 U.S. 549, 96 L.Ed. 1134, as to the existence of a through route. That test must be applied against the factual situation existing at the time the investigation was instituted and not, as the District Court applied it here, against what the factual situation might be under the proposed changes in litigation. To hold otherwise, would be tantamount to placing the "cart before the horse" or substituting proposed changes in lieu of the facts proposed to be changed thereby rendering investigations or litigation meaningless.

While the voluntary act of the parties may be sufficient to create joint rates and through routes something more is required to eliminate those joint rates and through routes once established. Here, the Court is concluding that the mere voluntary act of one party effectively changes, **ipso facto,** the character or nature of the route in question even though the legality of those changes has been in continuous litigation since the initial publications were suspended by the Commission.

The Court also erred as a matter of law in holding that the discrimination prohibited by 49 U.S.C.A. § 3 (4) is dependent upon whether the case is characterized as a "switching" or "routing" case, citing **Louisville & N. R. Co.** v. **United States,** (1915), 238 U.S. 1, 59 L.Ed. 1177, as authority for such a proposition. Not

only did this Court condemn such an attempt to explain away the mandatory provisions of that statute in the case relied upon by the lower court (JS pp. 27, 28) but this court specifically held that 49 U.S.C.A. § 3(4) "outlaws discrimination in all its forms" in **Dixie Carriers** v. **United States** (1956) 351 U.S. 56, 61, 100 L.Ed. 934.

Third, as to the scope of judicial review, the District Court applied techniques and standards which are completely at variance with those previously established by this Court. While "lip" service was given to the standards sanctioned in **United States** v. **Pierce Auto Freight Lines** (1946), 327 U.S. 515, 90 L.Ed. 821, no attempt was made to actually apply those standards to the case at bar. The most glaring example of such action is the holding by the lower court that it was not prejudicial error and indeed lawful for the Commission to continue in full force and effect a part of its prior order of March 19, 1957, without prior relief from the Federal Court which had set it aside. To permit such a holding to stand would certainly render Federal Court decisions meaningless and appeals thereto an utter waste of time and money.

Another example, is where the District Court made findings **de novo** on various aspects of the "public interest" issue (as to rates, routes and method to determine circuity over the latter) which the Commission itself was either unable or unwilling to make and which was held to be beyond the function of this Court in **U. S. v. Champlin Refining Co.,** (1951) 341 U.S. 290, 301, 95 L.Ed. 950. Certainly if such action is beyond the function of the United States Supreme Court, it is likewise beyond the function of the District Court.

Thus, unless the District Court is to be final and sole judge of its own power to determine the adequacy of agency findings, substantiality of evidence and its own decisions—which it now concludes may be disregarded by the very agency whose action it purports to review—the important questions raised by this appeal warrant the considered judgment of this Court. While there may be a twilight zone between what is permissible in the way of judicial review and what is not, appellants submit that the District Court has so far exceeded the proper scope of judicial review as to remove all doubt that it has in fact misapprehended and failed to apply the standards sanctioned by this Court for determining the adequacy, sufficiency and limitation of agency action encompassed within the statutory powers specifically designed to govern such action.

ARGUMENT

I. THE QUESTIONS PRESENTED BY THIS APPEAL ARE OF GENERAL PUBLIC IMPORTANCE

The answers to the questions presented by this appeal and the subsidiary questions comprehended therein are not only important to the particular litigants involved but are of vital importance to the general public as a means of providing an orderly procedure by which parties appearing before administrative agencies and the courts may be advised of and accorded the fundamental rights of justice and fair play which are implicit in our concept of ordered society.

We are not asking this Court to "weigh" the evidence in the proceedings before the Commission and are not even suggesting that such is necessary to decide the issues in this appeal. We do invite the Court's attention, however, to the fact that shippers or public witnesses have testified in every phase of those proceedings and are here represented by counsel in opposition to the proposed changes but none have ever appeared in support of such changes. In fact, the Commission made a specific finding with respect to shipper evidence in its initial decision condemning the proposed schedules. However, the Court in setting aside the Commission order for lack of sufficient findings was critical of the "weight" that had been given such evidence. Yet, in its second review, the Court apparently felt compelled to conjure up a finding to attribute to the Commission in the absence of an actual finding by the Commission on that issue.

We further submit that the fears expressed by the shippers should not have been so callously disregarded for the case at bar represents but one of many attempts by Southern Railway to effectuate a fantastic and vicious routing program involving the use of unreasonable and often discriminatory practices which have been repeatedly condemned by the Commission and the courts. See **Alabama Great Southern Railroad Co. v. United States,** (1958) 162 F. Supp. 614; **Southern Railway Co. v. United States,** (1957) 154 F. Supp. 562; **Southern Railway Co. v. United States,** (1957) 153 F. Supp. 57; **Southern Railway Company v. United States,** (1958) 166 F. Supp. 78. In the latter case, at page 81, the Court says:

"The only guiding principle underlying this whole-

> sale elimination of the intermediate carriers appears to be Southern's intent to secure its longest possible haul to destinations which it controls. Southern attempts to justify this restrictive routing by saying that the routes over these intermediate carriers involve 'unnecessary and wasteful transportation'. However, where another railroad serves the destination mills, either alone or in conjunction with Southern, Southern will bridge any portion of the traffic it can get, regardless of the length of haul. Apparently, under those circumstances, the interpolation of Southern as the intermediate carrier involves neither unnecessary nor wasteful transportation, or so it seems to Southern."

Here, as in those cases, Southern waited patiently until this and other traffic was sufficiently developed through the cooperative efforts of these railroad appellants and other railroad managements before launching its routing "blitzkreig." This brought about bitter and protracted litigation involving a constant wave of attacks and counterattacks in a multitude of cases. However, the illogical approach used by the District Court here could well sweep aside legal precedents heretofore established by the Commission, other District Courts, and this Court in similar cases. It could also trigger another outburst of routing cases and thereby thwart the competitive efforts of many railroads. Thus, it would only be a question of time before Southern would attempt to commercially close these and other routes for not only coal but other traffic if past experience is any determination of what the future holds.[2]

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[2] Although the Macon Branch is an integral and extremely important segment of the Georgia Railroad's operations, it is a marginal operation and any loss of traffic moving over that segment will severely affect its ability to continue efficient transportation not only on this but on traffic in general (Tr. 268, 299).

Appellants have not at any time, and do not now, deny that the objectives of eliminating wasteful transportation and promoting efficient and economic transportation are praiseworthy when lawfully accomplished. However, the interest of Southern Railway is not necessarily synonymous with the public interest and professed objectives, however praiseworthy they may be, should not be used as a guise to accomplish an unlawful act as Southern attempts to use them here. For example, in its initial review the lower court properly stated that Southern is here:

> "seeking to eliminate a joint rate as existing for all routes except the direct route, No. (1) and thus obtaining for itself the maximum haul without effective competition. . " 167 F. Supp. 747, at page 750.

Similar tariff provisions proposed by Southern were condemned by the Commission in **Cotton From the Southwest to Southern Territory,** (1958) 302 I.C.C. 637, 652, 653, affirmed in **Southern Railway Company v. United States,** (1958) 166 F. Supp. 78, at page 81:

> "The term public interest, as used in the statute, is not a mere general reference to public welfare, but as shown by the context and purposes of the Act, has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities. See **United States v. Lowden,** 308 U.S. 225, 84 L.Ed. 208; **State of Texas v. United States,** 292 U.S. 522, 78 L.Ed. 1402; **New York Central Circuities Co. v. United States,** 287 U.S. 12, 77 L.Ed. 138. Stated more specifically, Southern has the burden of showing that the interests, not only of Southern, but of the transportation service in general and

> the shipping public in particular would best be served by closing . . the routes presently available. ."

Thus, Southern's desire to gain additional traffic at the expense of and to the detriment of competing carriers should yield to the public interest; particularly so, where, as here, shippers have opposed but none have supported Southern's proposal to divert such traffic.

Since participation of those competing carriers in this traffic antedated that of Southern's, something more should have been required for Southern to meet its statutory burden of proof to satisfy the public interest issue than a geographical fact which has been in existence since Southern joined those competing carriers in joint rates and through routes, i.e., some routes are longer than others. Nevertheless, this is precisely what the lower court relied upon in its initial opinion to conclude that Southern had established a "prima facie" case. It did this, of course, by measuring the distance from a junction point, rather than primary origin, to final destination. On this theory there would never be any excuse for the maintenance of any route other than the short line distance between any two points or the short tariff route. Consequently, the carrier forming a part of the route having the shortest distance from any common gateway could dictate the closing of all longer competing routes as Southern proposes here. Such an impractical and completely illogical theory has never been used in the history of the Commission.

Perhaps the illogical nature of that theory is the reason why the Commission, apparently assuming

dicta statements of the Court to be the law of the case as Southern had contended, merely quoted the language of the Court rather than make a finding as to whether these routes constitute wasteful transportation.

Perhaps the Commission also remembered when that question was before them in **Coal and Coal Briquettes to the South,** (1953) 289 I.C.C. 341, wherein it had specifically held that these precise routes did not constitute wasteful transportation and were, in fact, desirable in the public interest. The same finding would have prevailed here but for the fact that the Court set aside the Commission's initial findings and concluded that Southern had established a "prima facie" case when measuring routes from a junction point to final destination. While the routes in question are obviously longer than the short tariff route, the fact remains that it does not cost Southern Railway a penny more to haul a Georgia Railroad car of coal from Macon, Georgia, to destination than it does to haul a Central of Georgia car of coal from Macon, Georgia, to destination.

Here, the reasons (delays, extra interchanges and protect long haul) advanced by Southern remained unchanged during the course of the further hearing before the Commission. In fact, Southern seemed content to sit back on its "prima facie" case and take "pot shots" at the affirmative evidence introduced by these appellants rather than attempt to meet its burden of proof under 49 U.S.C.A. § 15(7). As to delays, Southern's own operating witness admitted that the consolidation of Coast Line and L&N yards at Atlanta brought about a substantial improvement in operating

efficiency by the elimination of an interchange which had previously existed when the initial record was made and that Coast Line service would be better than that of Southern by four hours and 40 minutes (Tr. 508, Exhibit No. 60).

The number of interchanges required would be equal as between the Georgia Railroad and the so-called "retained" Central of Georgia route but less via the Coast Line than via the Central of Georgia route. In fact, the same number of interchanges would be required when the route including the Coast Line is compared with the Southern direct route.

Insofar as protection of a carrier's long haul is concerned, such protection is only accorded to the originating carrier (Southern does not originate a pound of this traffic) and then only where a through route is being prescribed by the Commission and not, as here, where a proposal is made to "commercially" close an existing through route by cancellation of the joint rate in connection therewith.

The L&N, an appellant herein, (but erroneously excluded as an appellant in the Government's motion to affirm) originates all of the traffic and owns all of the equipment used in transporting this traffic. Under Southern's routing restrictions the L&N is permitted to deliver traffic to the Southern Railway and Central of Georgia at Atlanta, destined to GS&F stations, but it is not permitted to deliver traffic to the Atlantic Coast Line and Georgia Railroad at the lowest applicable joint rate applying from the involved mine origins to those destinations (Tr. 274, 349, 350). Whereas, in **Louisville & Nashville Railroad Company, Merger, Etc.,** (1957) 295 I.C.C. 457, the Commission stated:

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> "We deem it imperative, however, that our order approving the merger be conditional so as to insure the maintenance of all existing joint routes. ."

The joint routes referred to above included the Coast Line and Georgia Railroad routes here involved. Southern took an active part in that proceeding and insisted on the above-quoted provision being made a condition precedent to the Commission's approval of the merger. Moreover, in view of this condition which was made in the public interest, it seems only logical that if the originating carrier of the traffic here involved could not cancel or commercially close the routes in question, an intermediate carrier should not have been allowed to do so.

Complete statements by the Court showing the grounds upon which its determinations rest are just as necessary as are reports of the Commission setting forth the reasons on which they base their decisions and general or "cryptic" statements to the effect that all the evidence of record was considered neither add to nor subtract from those legal requirements; particularly so where, as here, the grounds upon which such determinations rest touch vitally the public interest.

Certainly the findings made by the Commission on remand are no better than those initially condemned by the lower court and the mere fact that the conclusions have changed in conformity with dicta statements made by the Court does not justify those findings in fact or in law. Therefore, in the absence of a rational basis, not only should the Commission's second decision have been set aside but the opinion of

the Court reviewing it should be reversed for the same reason.

Furthermore, if this Court approves the action of the District Court, it will unduly hamper or impede judicial review and invite all administrative agencies to engage in (and of courts to tacitly approve) the practice of relying upon suspicion, surmise or plainly incredible standards for determining issues presented to them as is the situation here. Such practices have never been condoned by this Court and it should not do so now as the resulting lack of any uniform standard for determining substantiality of evidence would make the administration of agency matters difficult if not impossible.

II

THE QUESTIONS PRESENTED BY THIS APPEAL ARE SUBSTANTIAL

A. Judicial review of agency action is limited but not perfunctory and embraces more than mere recitation without application of standards approved by this Court

The Interstate Commerce Commission has no more power than is given to it by statute creating it and setting forth its powers as stated in **Southern Pacific Co. v. Interstate Commerce Commission,** (1911) 219 U.S. 433, 55 L.Ed. 283, and if its action goes beyond such statutory authority or fails to meet the requirements of said statutes, it is invalid and cannot be sustained. Insofar as its quasi judicial functions are concerned,

the Commission must in all stages of proceedings before it adhere to the requirements, the letter and the spirit of the Administrative Procedure Act, 5 U.S.C. § 1000, et seq.

Where a final decision and order is issued by that agency, Section 10 of the Administrative Procedure Act, 5 U.S.C.A. § 1009, gives an aggrieved party the right to judicial review thereof, including any preliminary, procedural or intermediate action taken by such agency and "due account shall be taken of the rule of prejudicial error." Thus, the final order must be supported by basic findings contained in the report accompanying it but such findings must in turn be supported by substantial evidence in the record.

In its initial review, the lower court set aside an order of the Interstate Commerce Commission and remanded the case to the Commission for further proceedings. In doing so, however, it specifically stated the basis upon which its decision was made in **Southern Railway** v. **United States**, (1958) 167 F. Supp. 747, 752:

> " . . our disposition of the case is based on the nature of the findings and conclusions of the Commission. . "

Insofar as those findings were concerned, the Court merely held that the Commission had not gone far enough to sustain the validity of the conclusions in its order. In fact, the Court inferred that even those findings, as well as the conclusions reached by the Commission, might be enough as to that part of the publications concerning the Central of Georgia but hastened to add at page 755, "it is not within our province to give effect to a part of the suspended schedule

and to cancel other parts of it."

The Court certainly made no attempt to decide the public interest issue and repeatedly pointed out that "it is the Commission's duty to weigh and adjust conflicting interests." In fact, the Court concluded that the failure of the Commission to make findings of fact which could be considered as offsetting the longer distance via some routes as compared with others:

> ". . make it impossible for us to determine between conflicting interests, which determination it [the Commission] alone may make." 167 F Supp. at p. 755.

It was, of course, not incumbent upon appellants to appeal the initial review by the lower court since nothing was finally decided. The whole proceeding thereafter was **in fieri** and the Commission had a perfect right on reconsideration to make a new record. **Ford Motor Co.** v. **National Labor Relations Board,** 305 U.S. 364 (1939), 83 L.Ed. 221. This was an interlocutory order that was appealable because Congress, notwithstanding its interlocutory character, had made it appealable. The statute, however, does not require an aggrieved party to take such an appeal in order to protect his rights, and, where it is not taken, does not impair or abridge in any way the previously existing right upon appeal from the final decree to challenge the validity of the prior interlocutory decree. **United States v. United States Smelting R and M Co.** (1950) 339 U.S. 186, 198, 199, Rehearing denied (1950) 339 U.S. 972.

Contrary to the action taken by the Court in its initial review, the Commission continued in full force and effect the order vacated by the Court without

making any attempt to "so shape its report" which contained the findings upon which that order was bottomed. Instead, on March 23, 195[illegible], the Commission merely modified its prior order or conclusions without changing the findings or reasons which purportedly supported that order. Such action led to an unlawful and completely illogical result as the modification in the order permitted that which the findings in the report would not permit. (Tr. 19-21) Thus, before the ink was hardly dry on the Court's decision, the Commission had done precisely that which the Court had condemned, i.e., issued an order not supported by basic findings essential to its validity. Yet, in its second review, the Court condoned such action on the part of the Commission.

Actually, the lower court attempted to side-step the issue by stating that "it was proper for the Commission to vacate" a part of the order which had already been vacated by a Federal Court and summarily rejected our prejudicial error contention on the grounds that prejudice cannot be based on what was lawful action in every respect." The fact that the Commission vacated a part of something that had already been vacated does not detract one iota from the fact that there is nothing that could justiy it in continuing in full force and effect that which had been vacated by a Federal Court. It necessarily follows that such a modification or ruling could have had, and we contend that it did have, a direct bearing upon whether like schedules, subsequently published by Southern, would be suspended by the Board of Suspension.[3] As a matter of fact, the Suspension Board declined to

[3]/A Board of the Commission employees established for the purpose of handling suspension matters pursuant to 49 U.S.C.A. § 17(2).

con inue the status quo until a valid order could be issued by refusing to suspend the schedules in question and the unlawful order thereby predetermined the issue before such Board in its decision to investigate rather than suspend those schedules in I.C.C. Docket No. 33128.

Despite the clear and unequivocal language of the Court in its initial review that it did not purport to decide the public interest issue, the Examiner who heard the evidence on further hearing under the remand decree merely cited the contentions of the parties and concluded on sheet 8 of his recommended report (R 395, document No. 10):

> "... the evidence on further hearing fails to offset the **holding** of the court that the proposed elimination of routes is consistent with the **public interest and is fully justified.**" (emphasis supplied)

The recommended report was affirmed by a Division of the Commission and petition for reconsideration thereof was denied. In its second review, the Court not only failed to rule whether this did in fact constitute prejudicial error but did say that the initial court order "remanded the case to the Commission with the **observation** that Southern had carried the initial burden of proving that the cancellation of routes (2) and (4) were just and reasonable and **consistent with the public interest** in view of the extent of circuity involved considered in the light of resulting **economic loss.**" **Atlantic Coast Line Railroad Co.** v. **United States,** (1962) 205 F. Supp. 360, 363.

An "observation" is quite different from a "holding".

as the Examiner found it to be and no basis is shown for the "economic loss" to which the court refers.

Whether the District Court did in fact draw conclusions and make rulings on the public interest issue which (by the very terms of its initial review it did not intend to do but which) the Commission construed to be the law of the case presents a substantial question for determination by this Court; particularly so, since the lower court now refers to such purported "holdings" as "observations" but nevertheless condones the action taken by the Commission. In either event, prejudicial error has been established.

It is true that the lower court recited certain standards approved by this court as to the scope of judicial review, but mere recitation without application of those standards is not sufficient compliance therewith and constitutes a denial of due process.

Ordinarily, due process of law is thought of as simply the methods of procedure which were at common law usually applied in connection with the accusation and trial of supposed offenders. Today, due process of law means reasonable law and reasonable procedure or a conspicuous adherence to common sense. It is upon this premise that we predicate our contention that appellants were denied due process of law in violation of the Fifth Amendment of the Constitution of the United States.

It would seem elementary that regardless of whether the order of the Commission or the reviewing court is in form within the delegated power, it must be treated as not embraced therein, where, as here, the exertion of authority has been manifested in such an

unreasonable manner as to cause it, in truth, to be within the fundamental rule that substance, and not the shadow, determines the validity of the exercise of that power. See **Interstate Commerce Commission v. Illinois Central Railroad Company**, (1910) 215 U. S. 452. 54 L.Ed. 280.

Certainly no exhaustive explanation of the merits of the case is necessary to answer the questions presented by this appeal where errors of fact and law appear on the face of the opinion itself. In fact, the Commission report which it purported to review is subject to the same infirmities which moved the Court to set aside the first order of the Commission, i.e., lack of basic findings sufficient to sustain the validity of an administrative order.

In the final analysis, whether the District Court did exceed the proper scope of judicial review in the matters which will be discussed in the remaining sections of this brief certainly raises substantial legal questions on which this Court should pass, involving as they do sections of the Interstate Commerce Act under which there is a considerable amount of litigation.

B. The District Court Erred, As A Matter Of Law, In Qualifying And Failing To Apply The Mandatory And Unqualified Provisions Of The Statute Prohibiting Discrimination.

In a feeble effort to explain away the unqualified and mandatory provisions of 49 U.S.C.A. § 3(4) prohibiting discrimination between connecting carriers, the District Court says that statute, "involves comparable conditions and the route of the Georgia

being closed does not compare with that of Southern or the Central of Georgia" and "we are not here concerned with switching or terminal services." Such statements are certainly not sufficient in law or in fact to qualify the mandatory provisions of that statute which this court has held "outlaws discrimination in all its forms". **Dixie Carriers v. United States,** (1956), 351 U.S. 56, 61, 100 L.Ed. 394.

Insofar as comparable conditions are concerned, the chart at the beginning of this brief clearly shows that the services performed by the GS&F are the same at Macon whether a Central of Georgia or Georgia Railroad car is tendered under joint rates and through route arrangements which have been in effect for more than a half century. Moreover, the distance traversed in performing the service for the railroad discriminated against is also identical with the service performed for the preferred railroads. In addition, there is absolutely nothing in the record to show that the expense is even a penny more for performing that service in connection with the former than in connection with the latter.

The difficulty encountered by the lower court is that it not only misconstrues the position of appellants but fails to take into account the factual situation in this case. Appellants do not contend, as the District Court otherwise infers, that Southern or any other railroad must enter into joint rates and through routes with all carriers reaching a given point. We do, however, contend that if it does enter into such arrangements with several railroads it must not thereafter discriminate in its charges for like or similar transportation services performed for those connecting carriers at that point.

In fact, the reasoning of the District Court on the discrimination issue is in irreconcilable conflict with its reasoning on the circuity aspect of the public interest issue. In one breath the Court says it is fruitless to consider the route itself as consideration must be confined to a segment thereof in any determination of the public interest issue. In the same breath, however, the Court says consideration cannot be confined to what happens at a particular point or over a given segment to determine whether discrimination is practiced, for to do so would be "to eliminate consideration of the route itself." This cannot be ascribed to an unfortunate choice of language but rather it clearly indicates the application of an erroneous standard of judicial review for in the first instance the Court attempts to limit the factors to be considered by the Commission in its determination of the public interest issue and in the latter instance attempts to rewrite the law or place a strained interpretation upon the statute prohibiting discrimination.

The method by which circuity of routes is measured to determine wasteful transportation, as used by the Court in its initial review, certainly did not constitute the law of the case as the Commission construed it to be and the entire route should have been taken into consideration rather than a segment thereof insofar as the public interest issue was concerned. Conversely, only the services performed by the carrier charged with discrimination at the point where such discrimination is charged should be considered in determining whether there is a violation of Section 3(4). What other carriers do, not so charged, is completely irrelevant to the discrimination issue as is the transportation service performed by those carriers prior

to the time that the traffic reaches the point where discrimination is charged. Thus, only a comparison of the services performed by the GS&F for its connecting carriers is relevant as to whether it discriminates against one or more of those connecting carriers in its rates or charges for like or similar services. To hold otherwise, as the lower court did here, would be to ignore the unqualified provisions of the statute.

In addition to Macon, discrimination also occurs at Cordele, Georgia, since GS&F will accept Southern and Central of Georgia cars at Macon but will not accept cars loaded with coal from Coast Line at Cordele at the lowest competitive rate. Thus, as to the Atlantic Coast Line route, it is significant to note that both the Commission and the courts have held that the discrimination prohibited under Section 3(4) is not confined to situations involving interchanges at the same point. For example, in **Alabama, Tennessee and Northern R. Co.** v. **Southern Railway,** (1928) 148 I.C.C. 708, the Commission held that failure or refusal of defendant Southern Railway System to enter into joint rates with complainant on interstate traffic moving over complainant's lines between Mobile, Alabama, and all points on defendant's lines maintaining joint rates on like traffic in connection with the Mobile and Ohio and Gulf, Mobile and Northern Railroad via Meridian, Mississippi, and the Louisville and Nashville Railroad via Birmingham was a violation of that statute. See also **Routing via Quanah, A&P. Ry Co.,** (1935) 211 I.C.C. 443, 220 I.C.C. 137, sustained in **Thompson** v. **United States,** (1937), 20 F. Supp. 827; **Cancellation of Rates and Routes via Short Lines,** (1959) 245 I.C.C. 183; **Quanah, A.&P. Ry. Co.** v. **Atchison, T & S.F. Ry. Co.,** (1938) 226 I.C.C. 201.

Here, a higher rate will be assessed if the traffic has previously moved over one connecting carrier but a lower rate will be applied if the same traffic has moved over another connecting line. Yet, as stated in **Pennsylvania Co.** v. **United States** (1914) 214 F. 445, 449, if a reasonable compensation is fixed for the service **the carrier may not inquire into the route over which it has been moved** to reach its rails merely to decide whether or not it will transport the car so offered. That decision was affirmed by this Court in **Pennsylvania Co.** v. **United States,** (1915) 236 U.S. 351.

The District Court also attempted to qualify the discrimination prohibited by Section 3(4) on the basis of the services involved and concluding that the statute was not applicable since this is a "routing" and not a "switching" case, citing **Louisville & N. R. Co.** v. **United States,** (1915) 238 U.S. 1, as authority for such a proposition. However, the appellants in that case attempted to do precisely what the lower court concluded here by insisting that **Pennsylvania Co. v. United States, supra,** did not involve **switching** but **transportation.** Such an attempt to explain away the mandatory provisions of the statute was condemned by the Supreme Court in the **Louisville & N. R. Co. case, supra,** at page 20:

> ". . . but the alleged differences do not serve to take the present case out of the principle announced in that just cited. For in this order the prohibition against the existing practice and the requirement to furnish equal facilities come to the same thing."

Since other traffic is being interchanged between the Georgia Railroad and the GS&F at Macon, it is rank

discrimination to single out this coal traffic and say that higher rates should be assessed when a car is received from the Georgia Railroad than when received from the Central of Georgia or Southern. Considering such a situation in the **Louisville & N. R. Co.** case, **supra,** this Court stated at page 19:

> "In substance, that would be to discriminate not only against the tendering railroad, but also against the commodity which is excluded from a service performed for others."

Oddly enough, appellees point to the "relatively insignificant movement" but as this Court stated in **Chicago, I. and L. R. Co. v. United States,** (1926) 270 U.S. 287, 293, 294, 70 L.Ed 590, 594, the relatively small number of cars does not constitute differentiating circumstances which negative discrimination under Section 3(4) of the act. Surely if the traffic is substantial enough for Southern to make an effort to divert appellants' share thereof to itself, it seems only logical to conclude that it would be even more valuable to the smaller intermediate carriers thereby justifying an effort on their part to retain their own traffic which the proposals in question are designed to divert to Southern.

The opinion of the District Court stands alone in holding that Section 3(4) is not applicable in "routing" cases. Such a holding cannot find support in statutory or case law and is contrary to established legal precedents, including the holding of this Court that the involved statute "outlaws discrimination in all its forms." Even if the Commission had based its finding on transportation matters rather than the purported "holding" of the Court, discrimination that is

flatly forbidden by statute could not be sheltered under the shield of expertise.

Thus, whether, as this Court has ruled, the statute is clear and unequivocal in its terms or whether such terms are so ambiguous as to require an interpretation thereof, as the District Court has done here, presents a substantial question concerning the meaning and applicability of 49 U.S.C.A. §3(4) which should be resolved by this Court.

C. The District Court Misapprehended And Grossly Misapplied The Holding Out Test Approved By This Court In Thompson v. United States, (1952) 343 U.S. 549, 96 L.Ed. 1134.

The real difficulty as to the existence or non-existence of through routes in this case springs from the failure on the part of the Commission to make a finding with respect thereto. Even though appellants urged the lower court to rule that it was error for the Commission to have failed to do so, this plea was ignored as the District Court made a finding **de novo** which the Commission was unable or unwilling to make, i.e., the routes in question do not constitute through routes.

The District Court cited the "holding out test" approved by this Court in **Thompson** v. **United States, supra,** to support its finding that no through routes, including Atlantic Coast Line and the Georgia Railroad, exist. However, both the test and the case cited not only fail to support the finding made by the lower court but could only support a finding exactly opposite to that made by the District Court in this case. For example, there was no evidence in the **Thompson** case

that any shipment had ever moved over the route in question whereas in this case there have been movements over the routes in question for more than a half century. Although there were joint rates and through routes from the origin in question to points **short** of the destination sought in the **Thompson** case, there had never been joint rates and through routes from the origin (Lenora) to the destination involved (Omaha). On the other hand, no one even questions the fact that joint rates and through routes have been in effect from all origins to all destinations in this case for more than a half century and were in effect at the time the investigations were instituted by the Commission in this case. With these distinctions in the factual situation as between the two cases in mind, we turn now to the test unanimously agreed upon by this Court in the **Thompson** case at page 557:

> "In short, the test of the existence of a through route is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged or the through service."

The terms of the test are clear enough but the difficulty encountered by the lower court was in applying it against what the facts would be under the proposals in question rather than against the facts as they existed when the investigations were instituted by the Commission.

In any proceeding before an administrative agency or indeed in any case before a court of law, it is incumbent upon the agency or court to make certain basic findings of fact which existed **at the time** the in-

vestigation was initially instituted or **at the time** the cause of action arose. Proposed changes in the factual situation found to exist **at the time litigation begins** merely give rise to certain basic issues that must be determined on the basis of whether the causal effect which such requested changes are designed to bring about will be just, reasonable or otherwise unlawful. Certainly, neither subsequent acts by the parties nor decisions, rulings or opinions which are interlocutory in nature can change either the basic issues or the facts upon which they must be predicated.

Regardless of whether the effect of Southern's proposals was intended to cancel the rates thereby commercially closing the routes or whether its effect was intended to cancel the routes, there can be no question but that at the time both investigations were instituted the routes in issue were "through" routes and joint rates applied in connection therewith. Thus, it was incumbent upon the Commission to make a finding that the routes in question constituted "through" routes for the purpose of deciding the issues theretofore raised regardless of what transpired **after** litigation began. Here, the Commission failed to do so and the District Court erroneously made a finding **de novo** contrary not only to the evidence of record but the very test upon which it relies.

The combination rate that became applicable by virtue of Southern's action herein was so high that it "commercially" closed the routes on coal. However, as this Court stated in **Virginia Ry. Co.** v. **United States,** (1926) 272 U.S. 658, 666, 667, 71 L.Ed. 463, 468, the fact that a route is so closed does not bar the Commission from prescribing reasonable and non-discriminatory

through rates under Section 1 and 3 of the act, without proceeding under Section 15(3). Moreover, since other traffic is moving over the through Coast Line and Georgia Railroad routes at joint rates in connection with the GS&F today, it was sheer folly for the Court to hold that such routes were "closed."

Appellants submit that the District Court erred in making a finding as to the existence or non-existence of through routes in the absence of such a finding by the Commission and in approving an administrative order without such a basic finding. **A Fortiori,** we submit that this Court should determine whether the District Court misapplied the holding out test which was unanimously approved in the **Thompson** case in order to avoid the establishment of an illogical and dangerous precedent.

D. The District Court's Action In Limiting The Issues Was Not The Product Of Reason And Judgment But Was, In Fact, Arbitrary And Capricious

The finding which the District Court made with respect to the nature of the routes referred to in the preceding section of this brief was apparently to support another finding **de novo** which the Commission was unable or unwilling to make, i. e., since the routes were closed "no question was left as to the rates." Such a finding, however, is in irreconcilable conflict not only with the Commission order instituting the investigation under review but with the very terms of the statute by which the Court itself says the administrative decision is to be tested, i. e., Section 15(3) and 15(7)

of the Interstate Commerce Act, 49 U.S.C.A. § 15(3) and § 15(7).

In contrast with that finding the court had described the scope and effect of the schedules involved as follows:

> "**Seeking to eliminate the joint rate** as existing for all routes except the direct route, (1) and thus obtaining for itself the maximum haul without effective competition, the Southern filed with the Commission **schedules proposing to eliminate the joint rates . . .**" 167 F. Supp. 747, at page 750.

Moreover, no one questions the fact that joint rates and through routes applied via the Atlantic Coast Line and Georgia Railroad at the time the Commission instituted the investigation in this proceeding on July 10, 1959. In fact, the order instituting this investigation specifically referred to the **rate tariffs involved** including as to each "the reference marks bearing an **increase symbol.**" That order is reproduced herein for the convenience of the Court as Appendix B. Obviously, the only possible significance that such an increase symbol could have is with respect to the rate to be applied over the route that is cancelled **only insofar as the applicability of joint rates is concerned.** This fact is clearly shown in Exhibits 47, 51, 60 and 61 where the rate to be applied via the route including the Georgia Railroad, as shown in the "Discrimination" illustration at the beginning of this brief, is 495 cents per ton. This rate, as reflected in the exhibits referred to in that chart, was taken from the specific rate tariff here involved which was filed with the lower court in a rather ignominious fashion. (JS page 20, footnote 6).

Despite these uncontroverted facts, the District Court in its second review held that "no question was left as to rates" thereby sweeping aside the issues pertaining to Sections 1(4) and 1(5) of the act. That conception of the scope and function of the investigation proceeding by the Commission in I.C.C. Docket No. 33128 (erroneously referred to by the Court in its opinion as a suspension docket) is not only inimical to the very order initiating the proceeding but is contrary to the terms of 49 U.S.C.A.§ 15(7) by virtue of which said investigation order was issued. In fact, both the investigation order and that statute, by their very terms, concern themselves with the lawfulness of rules, regulations and practices affecting rates as well as rates themselves which must conform to all provisions of the Interstate Commerce Act which set forth standards of lawfulness, including Sections 1 and 3. Commenting on Section 15(7) of that statute, the Court stated in **Long Island Rail Road Company v. United States,** (1961), 193 F. Supp. 795, at page 800:

> ". . . It can hardly be doubted that limiting the effectiveness of a rate to one of a number of routes is a 'regulation or practice affecting any rate.' "

Thus, the higher combination rates that became temporarily applicable pending a final determination of the issues herein, constituted a part of Southern Railway's burden of proof and such issues should not have been summarily rejected as both the Commission and the lower court did here. As to those determinations, both the Commission and the courts have held as stated in **Cancellation of Routing, Paper, Gainesville M. R. Co.,** (1959), 306 I.C.C. 515, 520:

> "An appropriate standard with which to measure the justness and reasonableness of the rates over the Gainesville Midland routes (here Coast Line and Georgia Railroad routes) is the level of comparable rates from and to the same points over the competitive routes (here Southern and Central of Georgia routes). See **Carolina, C&O Ry. Co.** v. **Southern Railway Co.**, 299 I.C.C. 335; sustained **Southern Ry. Co.** v. **United States**, 153 F. Supp. 57." (Parenthetical expression supplied)

In addition, this Court specifically stated in **U. S.** v. **Champlin Refining Co.**, (1951) 341 U. S. 290, 301, 95 L.Ed. 950 that it was beyond its function "to rescue the Commission by making findings **de novo** which the Commission itself was unable or unwilling to make." Certainly if such action is beyond the function of the United States Supreme Court, it is likewise beyond the function of the District Court to make such basic findings which the Commission should have made in the first instance and which are necessary to sustain the validity of its orders.

CONCLUSION

The findings which the District Court apparently felt compelled to make so as to sustain the Commission's order, in the absence of such findings by the latter, emphasize not only the basic weakness in the Commission's report but disregard the primary purpose of court review, i.e., to examine what the agency has done and the basis for it—not to conjure up findings to support it. In addition, the opinion of the lower court is based on not only errors of law but on assump-

tions which are not sustainable in the record and neither of the motions to affirm has shown otherwise.

The District Court's mere recitation without application of standards approved by this Court constitutes a philosophy completely foreign to our jurisprudence and if permitted to go uncorrected will virtually make a mockery of judicial review. Therefore, appellants submit that the questions presented by this appeal are substantial, are of general public importance and merit full consideration by this Court. The judgment of the District Court should be reversed.

Respectfully submitted,

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PROOF OF SERVICE

I, Albert B. Russ, Jr., one of the attorneys for appellants and intervening appellants herein, and a Member of the Bar of the Supreme Court of the United States, hereby certify that, on the 4th day of September, 1962, I served copies of the foregoing brief of appellants in opposition to motions to affirm, on the several parties of record, as follows:

(1) On the United States, by mailing copies thereof in duly addressed envelopes, with first class postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C., and to Floyd M. Buford, Esquire, United States Attorney for the Middle District of Georgia, U.S. Post Office Building, Macon, Georgia.

(2) On the Interstate Commerce Commission, by mailing copies, in duly addressed envelopes, with first class postage prepaid, to Messrs. Leonard S. Goodman and Robert W. Ginnane, its Counsel, to the office of the Commission, Washington 25, D. C., and,

(3) On Southern Railway and Georgia, Southern and Florida Railway, intervening defendants before the Court below, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective Attorneys of Record, i.e., (1) Mr. R. Granville Curry, 631 Southern Building, Washington 5, D. C.; (2) Mr. Henry J. Karison, Southern Railway Building, Washing 13, D. C., and (3) Mr. Charles J. Bloch, 520 First National Bank Building, Macon, Georgia.

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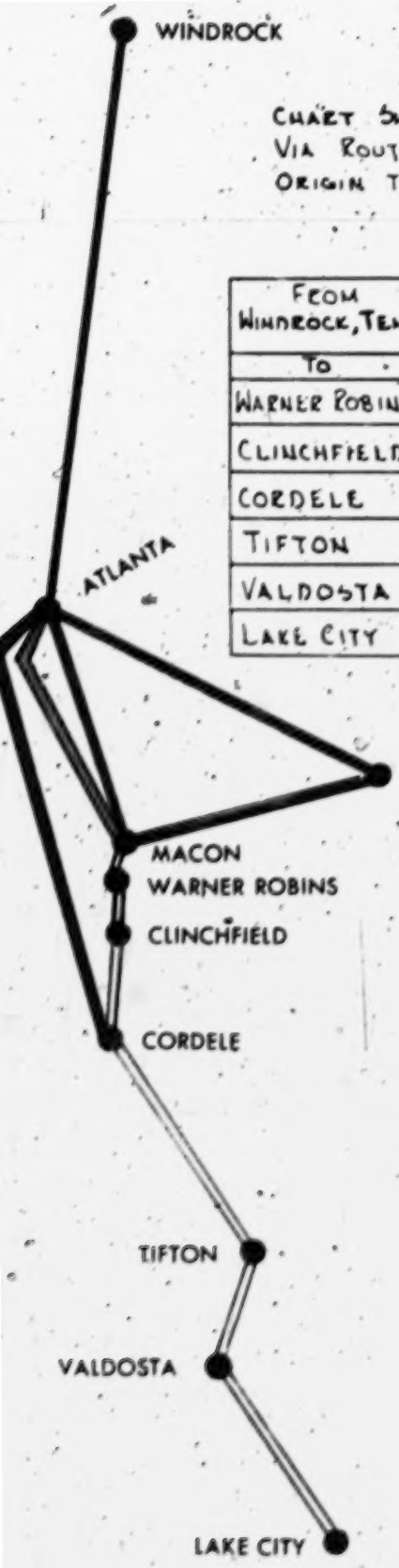
CHART SHOWING DISTANCE, CIRCUITY AND SERVICE, VIA ROUTES INDICATED FROM REPRESENTATIVE ORIGIN TO REPRESENTATIVE DESTINATIONS.

FROM WINDROCK, TENN.	L&N ATLANTA SOU. RY. MACON GS&F		L&N ATLANTA ACL CORDELE GS&F		L&N ATLANTA CofGa. MACON GS&F		L&N ATLANTA GA. RR MACON GS&F	
TO	MILES		MILES	CIR.	MILES	CIR.	MILES	CIR.
WARNER ROBINS	343		453	32.1	352	2.60	452	31.78
CLINCHFIELD	358		438	22.3	367	2.50	467	30.45
CORDELE	391		404	3.32	400	2.30	500	27.88
TIFTON	432		445	3.01	441	2.08	541	25.33
VALDOSTA	478		491	2.72	488	2.09	587	22.80
LAKE CITY	539		552	2.41	548	1.67	648	20.22



SOURCE: SHEET 5 OF DIVISION 2'S REPORT AND EXHIBIT No. 11.

SERVICE- WINDROCK, TENN. TO WARNER ROBINS, GA.		
VIA	INTERCHANGE	TIME IN TRANSIT
L&N SOU GS&F	1	58 HRS 39 MIN
L&N GA. GS&F	2	55 HRS 04 MIN
L&N ACL GS&F	1	50 HRS 14 MIN
L&N CofGA GS&F	2	55 HRS 04 MIN

LEGEND

- LOUISVILLE & NASHVILLE
- GEORGIA RAILROAD
- ATLANTIC COAST LINE
- CENTRAL OF GEORGIA
- GEORGIA SOUTHERN & FLORIDA
- SOUTHERN RAILROAD

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION Division 2, held at its office in Washington, D. C., on the 10th day of July, A.D. 1959.

No. 33128

ROUTING — COAL —

L&N MINES TO GS&F(SRS) STATIONS

There being under consideration the matter of rules, regulations and practices affecting rates and charges applicable on coal, in carloads, from Louisville and Nashville Railroad Company mines in Kentucky, Tennessee and Virginia to Georgia, Southern and Florida Railroad Company (Southern Railway System) stations in Georgia and Florida, as set forth in the following:

Southern Freight Association, Agent:

I.C.C. 1427 (Spaninger series);

In SUPPLEMENT 78, on page 3, in Items 9188-C through 9330-C, the reference mark bearing an increase symbol, and the explanation thereof

In SUPPLEMENT 80, on page 3, all matter which is a reissue of, or is the same as, that suspended in SUPPLEMENT 79

I.C.C. 1499 (Spaninger series);

In SUPPLEMENT 82, on page 4, in Items 25840-C through 25506-C, the reference mark bearing an increase symbol, and the explanation thereof

also, in

I.C.C. S-62, all matter which is a reissue of, or is the same as, that suspended above in I.C.C. 1427 and 1499

or as the same may be amended or reissued;

It appearing, That, upon consideration of the said tariff schedules, and protest thereto, there is reason to institute an investigation to determine whether they result in rates and charges, rules, regulations and practices that are unjust and unreasonable in violation of the Interstate Commerce Act; and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges, rules, regulations, and practices contained in said schedules, with a view to making such findings and orders in the premises as the facts shall warrant.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said rates, charges, rules, regulations and practices under the Interstate Commerce Act.

It is further ordered, That the carriers parties to said schedules be, and they are hereby, made respondents to this proceeding; that a copy of this order be served upon the said respondents; and that notice of this proceeding be given the public by posting a copy of this order in the Office of the Secretary of the Commission.

And it is further ordered, That this matter be assigned for hearing at a time and place to be hereafter fixed.

By the Commission, Division 2.

HAROLD D. McCOY
Secretary

(SEAL)

MICRO CARD
TRADE MARK ®

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MATTHEW BENDER & COMPANY
MB
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micro card

PC1008 2